

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

OCCIDENTAL FIRE & CASUALTY
OF NORTH CAROLINA,

2:09-CV-2207 JCM (VCF)

Plaintiff,

V.

INTERMATIC INCORPORATED, et al.,

Defendants.

ORDER

16 This is a diversity action filed against defendants True Manufacturing Company and True
17 Food Service Equipment (collectively “True”) by plaintiff Occidental Fire and Casualty of North
18 Carolina (“Occidental”). Before the court are seven motions *in limine* (Docs. 126, 150-153, 157, and
19 182) filed by the parties:

20 1. Defendants' motion *in limine* (Doc. 126) regarding plaintiff's expert, John Chaney

21 2. Defendants' motion *in limine* (Doc. 150) regarding evidence relating to implied warranties

22 3. Defendants' motion *in limine* (Doc. 151) regarding evidence relating to express warranties

23 4. Defendants' motion *in limine* (Doc. 152) regarding communications from Tom Tomeo to

24 the court

25 5. Defendants' motion *in limine* (Doc. 153) regarding plaintiff's expert, Chuck Wilds

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1 6. Plaintiff's motion *in limine* (Doc. 157) regarding testimony concerning a lack of prior fires
 2 caused by this particular freezer model, testimony concerning prior repairs, and testimony indicating
 3 that an arsonist might have entered through a particular exterior door

4 7. Defendants' motion *in limine* (Doc. 182) regarding defendants' prior retention of William
 5 Haack and evidence pertaining to his opinions as an expert

6 **Legal Standard**

7 “Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the
 8 practice has developed pursuant to the district court’s inherent authority to manage the course of
 9 trials.” *Luce v. U.S.*, 469 U.S. 38, 41 n.4 (1980). Judges have broad discretion when ruling on
 10 motions *in limine*. *See Jenkins v. Chrysler Motors Corp.*, 316 F.3d 663, 664 (7th Cir. 2002); *see also*
 11 *Trevino v. Gates*, 99 F.3d 911, 922 (9th Cir. 1999) (“The district court has considerable latitude in
 12 performing a Rule 403 balancing test and we will uphold its decision absent clear abuse of
 13 discretion”).

14 “[*I*]n *limine* rulings are not binding on the trial judge [who] may always change his mind
 15 during the course of a trial.” *Ohler v. United States*, 529 U.S. 753, 758 n.3 (2000); *accord Luce*, 469
 16 U.S. at 41 (noting that *in limine* rulings are always subject to change, especially if the evidence
 17 unfolds in an unanticipated manner). “Denial of a motion *in limine* does not necessarily mean that
 18 all evidence contemplated by the motion will be admitted at trial. Denial merely means that without
 19 the context of trial, the court is unable to determine whether the evidence in question should be
 20 excluded.” *Indiana Ins. Co. v. Gen. Elec. Co.*, 326 F. Supp.2d 844, 846 (N.D. Ohio 2004).

21 **I. Discussion**

22 The court will address only those facts which are pertinent to resolution of the instant
 23 motions *in limine*.

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1 **A. Defendants' Motion *in Limine* regarding John Chaney (Doc. 126)**

2 With this motion, defendants seek to exclude the testimony of plaintiff's damages expert,
 3 John Chaney. Defendants claim that Chaney calculated damages according to a method that is
 4 impermissible under Nevada law. Accordingly, they assert that presentation of Chaney's opinion
 5 would tend to confuse or mislead the jury and should be excluded under Federal Rule of Evidence
 6 403.

7 Under Nevada law, there are several acceptable methods of measuring damages in a tort
 8 action involving total loss of a structure. Among them are the cost of replacing the structure minus
 9 depreciation and the actual value of the property. *Harvey v. Sides Silver Min. Co.*, 1 Nev. 539, 542
 10 (1865); *Richfield Oil Corp v. Harbor Insurance Co.*, 85 Nev. 185, 192. Defendants do not point to
 11 any language indicating that these are the only methods that can be used to determine damages in
 12 this type of action. Defendants argue that because Chaney developed his estimate by determining the
 13 "actual cash value of the loss," his opinion is not relevant to a determination of the actual value of
 14 the property or the cost of replacing the structure.

15 Plaintiff opposes the motion by indicating both that Chaney did base his calculation on
 16 another report which used the cost of replacement minus depreciation methodology, but even if he
 17 had not it argues that Nevada does not require damages to be calculated by one of these methods
 18 named by defendants. (ECF No. 136)

20 Defendants do not show that Chaney developed his opinions using a method other than the
 21 acceptable cost of repair minus depreciation method. Thus, the court finds that defendants have not
 22 met their burden to show that this evidence is not relevant or that it is likely to confuse the issues,
 23 and accordingly will not exclude the evidence pursuant to Federal Rules of Evidence 401 through
 24 403 at this time. Accordingly, the motion is denied.

25 **B. Defendants' Motion *in Limine* Regarding Implied Warranties (Doc. 150)**

26 With this motion, defendants request that evidence relating to the implied warranties of
 27 merchantability and fitness for a particular purpose be excluded from trial. Defendants correctly state
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1 that Nevada law has adopted UCC provisions allowing sellers of goods to disclaim these warranties.
 2 *See, e.g., Sierra Diesel Injection Serv. v. Burroughs Corp.*, 890 F.2d 108, 113 (9th Cir. 1989). Plaintiff
 3 points out that the freezer's manual contained conspicuous language disclaiming these warranties,
 4 which is sufficient under Nevada law to relieve a seller of the burden of the implied warranties of
 5 merchantability and fitness. Plaintiff filed no response. Thus, the court will grant this motion as
 6 unopposed.

7 **C. Defendants' Motion *in Limine* Regarding Express Warranties (Doc. 151)**

8 With this motion, defendants argue that evidence relating to the express one-year parts and
 9 labor warranty and the four-year warranty on the freezer's compressor should be excluded. The
 10 warranty language in the freezer's manual specifically stated that the one-year parts and labor
 11 warranty would only apply if the freezer was installed in accordance with the provisions of the
 12 instruction packet. The instruction packet states that the freezer must be used with a properly
 13 grounded three-prong wall outlet. Defendants state that the freezer in this case was initially plugged
 14 into an improperly wired outlet, and thus the warranty was voided.

15 Furthermore, defendants assert that the four-year compressor warranty is not relevant to this
 16 case, because plaintiff has not claimed that the compressor was the cause of the fire.
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18 Plaintiff filed no response. Accordingly, the court will grant this motion.

19 **D. Defendants' Motion *in Limine* Regarding Communications to the Court from Tom
 20 Tomeo (Doc. 152)**

21 With this motion, defendants request the exclusion of evidence relating to the timeliness of
 22 defendants' payment to Tom Tomeo. Tomeo addressed a letter to the court on November 20, 2011,
 23 which claimed that the defense counsel refused to pay the fees for the services he provided as an
 24 expert for the defendants. Defendants argue that this evidence should be excluded as it is not relevant
 25 to determining the facts at issue in the case and it is prejudicial to the defendants. Plaintiff filed no
 26 response to this motion. Accordingly, the court will grant this motion *in limine* as unopposed.

1 **E. Defendants' Motion *in Limine* Regarding Chuck Wilds (Doc. 153)**

2 With this motion, defendants argue that the testimony of plaintiff's expert Chuck Wilds
 3 should be excluded. Defendants assert that they suffered substantial prejudice because they were
 4 unable to depose Wilds due to the physical and mental impairments he suffered while being treated
 5 for cancer. Wilds does not appear on plaintiff's witness list. Plaintiff did not file a response to this
 6 motion. Accordingly, the court will grant this motion as unopposed.

7 **F. Plaintiff's Motion *in Limine* Regarding (a) Evidence of a Lack of Prior Fires, (b)
 8 Evidence Regarding Prior Repairs, © Evidence Regarding an Open Door and the
 9 Possibility of Arson (Doc. 157)**

10 1. Evidence Relating to a Lack of Prior Fires Caused by Freezers of this Model

11 Plaintiff argues that defendants should not be allowed to present evidence indicating that the
 12 particular model of freezer at issue in this case has not been responsible for other fires. In support
 13 of this motion, plaintiff argues that such evidence is irrelevant because “[p]laintiff will offer
 14 evidence at trial conclusively establishing that a T-72 freezer was the only possible cause of [this]
 15 fire,” and that “evidence of prior fires and their causes are entirely irrelevant and must be excluded.”
 16 While the plaintiff’s observation is technically correct, that there would be little probative value in
 17 allowing the defendants to recount dramatic tales of fires that were not caused by T-72 freezers, its
 18 argument is still lacking. Though evidence of other fires with unrelated causes provides little insight
 19 into this case, evidence conveying that this particular freezer model has never caused a fire before
 20 could be highly probative in determining whether or not a T-72 freezer caused the particular fire at
 21 issue here.

22 It is widely recognized that this type of evidence can be probative: “there is little doubt
 23 that as a general matter evidence concerning the absence of prior accidents can satisfy the
 24 relevance threshold established by Rule 402. Courts have indicated that such evidence may be
 25 relevant to show (1) the absence of the alleged defect; (2) the lack of a causal relationship
 26 between the injury and the defect or condition charged; and (3) the nonexistence of an unduly
 27 dangerous situation.” *Forrest v. Beloit Corp.*, 424 F.3d 344, 356 (3d Cir. 2005). As such, this

1 aspect of plaintiff's motion *in limine* is denied, and defendants may attempt to lay a proper
 2 foundation for this evidence at trial. Plaintiff may object at that time if it is so inclined.

3 2. Evidence Relating to Prior Repairs

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 5 Plaintiff requests that evidence relating to prior repairs to both the freezer and the electrical
 6 socket be excluded pursuant to Federal Rule of Evidence 402 or 403. Plaintiff asserts that even
 7 though two of the freezer's motors were replaced after being "burned out" and the electrical socket
 8 that the freezer was plugged into was re-wired prior to the fire, that there is no evidence showing
 9 these repairs in any way contributed to the fire. Thus, plaintiff argues that the presentation of this
 10 evidence is not relevant, and would confuse the jury if presented at trial.

11 Defendants contend that this evidence is relevant to determine the cause of the fire, as the
 12 wiring that the freezer was initially plugged into was improperly installed such that 200 volts were
 13 supplied to parts of the freezer only designed to utilize 110 volts. Despite the repairs to the freezer
 14 and the socket that took place, defendants posit that the initial excess of voltage may have damaged
 15 a component of the freezer that was not later repaired, and that one of these components might have
 16 been the source of the fire. The court agrees that this evidence could assist the jury in determining
 17 whether a defect in the freezer existed while it was in the defendants' possession, and that the
 18 probative value of this evidence is not substantially outweighed by the danger of misleading the
 19 jury. Thus, this component of plaintiff's motion *in limine* is denied.

20 3. Evidence Relating to an Open Exterior Door and Arson

21 Plaintiff requests that evidence inaccurately indicating that a particular door could have
 22 given access to the inside of the building be excluded under Federal Rule of Evidence 403.
 23 Throughout discovery, some of defendants' experts apparently made reference to the possibility that
 24 an arsonist could have entered this door, which was left open during the fire, and intentionally set
 25 the building ablaze. (Doc. 157 6:11-14). Plaintiff has since clarified, and defendants do not dispute,
 26 that the door in question gave no access to the interior of the building and led only to an outdoor
 27 utility closet. Thus, it would have been a physical impossibility for an individual to use that door

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1 to gain access to the building.

2 Defendants' response to this motion does not refute plaintiff's argument that the court
 3 should exclude evidence tending to indicate that (1) the door lead to the interior of the building or
 4 (2) that an individual could have entered through the door and intentionally set the building on fire.
 5 Therefore, this component of plaintiff's motion *in limine* is granted.

6 **G. Defendants' Motion *in Limine* Regarding William Haack (Doc. 182)**

7 Defendants request that evidence relating to their retention of William Haack as well as any
 8 of his statements, if presented in his capacity as an expert, be excluded from trial. Plaintiff correctly
 9 notes that this motion was filed long after the deadline for motions *in limine*. Filing this motion a
 10 mere eleven days prior to trial denied plaintiff an adequate opportunity to respond. Furthermore,
 11 defendants fail to show that their retention of Haack does not meet the standard of relevance under
 12 Federal Rule of Evidence 401. The fact that Haack participated in the joint scene examination by
 13 the parties shows that defendant was not denied the opportunity to inspect the fire scene, that
 14 defendants were given the opportunity to preserve evidence from the scene if they chose to do so.
 15 The court agrees that this evidence could be relevant and that to exclude evidence of Haack's
 16 retention by defendants and his opinions has the possibility of creating unfair prejudice rather than
 17 resolving it. Accordingly, this motion is denied.

18 **III. Conclusion**

19 **IT IS HEREBY ORDERED** that motion *in limine* (Doc. 126) is **DENIED**.

20 **IT IS FURTHER ORDERED** that motion *in limine* (Doc. 150) is **GRANTED**.

21 **IT IS FURTHER ORDERED** that motion *in limine* (Doc. 151) is **GRANTED**.

22 **IT IS FURTHER ORDERED** that motion *in limine* (Doc. 152) is **GRANTED**.

23 **IT IS FURTHER ORDERED** that motion *in limine* (Doc. 153) is **GRANTED**.

24 **IT IS FURTHER ORDERED** that portions of motion *in limine* (Doc. 157) regarding a lack of
 25 prior fires and prior repairs is **DENIED**. The remaining portion, relating to the open exterior door
 26 and arson, is **GRANTED**.

IT IS FURTHER ORDERED that motion *in limine* (Doc. 182) is **DENIED**.

DATED August 15, 2013.

UNITED STATES DISTRICT JUDGE